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IN THE

Supreme Court of the United States

October Term, 1970

No. 6675

STEVEN P. DUFFEN,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement of the Case	2
Argument	3
Conclusion	10

CASES CITED

Coleman v. Alabama, —— U.S. —— (1970)	10
Foster v. California, 384 U.S. 440 (1969)	9
Gilbert v. California, 388 U.S. 263 (1967)	9
Simmonds v. United States, 390 U.S. 377 (1968)	9
Stovall v. Denno, 388 U.S. 293 (1967)	9
United States v. Wade, 388 U.S. 218 (1967)	9
Wong Sun v. United States, 371 U.S. 471	9

Questions Presented

On the night of February 15, 1967 at Wilton, Connecticut the night manager of a chain supermarket was robbed at gunpoint of the day's receipts as he was in the process of depositing the proceeds at the night depository of a bank. Three days after the robbery the night manager identified the petitioner from a series of nine (9) photographs which were shown to him by a police officer. Over a year later the petitioner was returned to Connecticut from New Jersey. On April 26, 1968, the day assigned for a hearing in probable cause at the Norwalk Circuit Court, the victim of the crime saw the defendant at the State Police barracks in Westport prior to the Court hearing. At the actual jury trial the victim positively identified the petitioner as the perpetrator of the crime.

1. Did the chance meeting at the State Police barracks constitute a critical stage of the criminal proceedings so as to deprive the petitioner of his right to counsel as secured to him by the Sixth Amendment; (b) was this encounter at all suggestive and did it play any role whatsoever in the in-court identification of the petitioner by the victim; (c) under the totality of circumstances in this case was the petitioner denied a fair trial and was he deprived of due process.

2. Did the trial judge's treatment of the identification issue affect the constitutional rights of the petitioner.

Statement of the Case

After a trial to the petit jury and a guilty verdict the petitioner was sentenced to a minimum term of five (5) years and a maximum term of seven (7) years in the Connecticut State prison. The jury of twelve had previously found him guilty of robbery with violence in violation of Section 53-14 of the Connecticut General Statutes.

On February 15, 1967, James Wakula was the assistant manager of the Shopwell Supermarket in Norwalk, Connecticut. It was part of his duties to make the night deposit at the Fairfield County Trust Company which was located approximately two hundred (200) yards from his place of employment. The store was closed at about 9:00 p.m. that evening and at 10:00 p.m. he drove his automobile to the bank to make the night deposit. Upon arriving at the bank which was well lit, an individual approached his car on the driver's side. The individual carried a gun and requested Wakula to move over to the passenger's side. The individual, not wearing a mask, drove the vehicle to a nearby service station. He told Wakula that he was not going to harm him, took the money, leaving Wakula at the service station and drove a short distance where he left the car. The credit manager of a retail store in Hartford, Connecticut, identified the petitioner as the individual who was in his establishment on February 14, 1967 and was seen driving a motor vehicle which was seen in the proximity of the robbery site just prior to the crime. Three days after the crime the victim identified the petitioner from a series of nine (9) photographs of individuals resembling the description which had been previously given the police. At

a coincidental meeting over a year after the crime the victim again met the petitioner. In addition the State produced independent testimony of an admission of responsibility for the crime by the petitioner. The in-court identification was not related to the chance meeting but was based on the view with ample lighting which the victim had of the petitioner on the night of the crime.

Argument

A reading of the trial record clearly indicates that the chance meeting at the State Police barracks played no significant part in the actual in-court identification; the display of photographs to the victim by a State Police officer shortly after the crime did not prejudice the rights of the petitioner; the in-court identification by the victim stands alone and was based solely on the recognition made on the night of the crime; and under the totality of circumstances there was no deprivation of due process and the petitioner was afforded a fair trial.

The lighting conditions and other factors regarding the ability of a person to recognize or identify an individual were good at the site of the crime. The circumstances fortify the in-court identification. On these conditions we have the testimony of the victim, James Wakula, assistant manager of Shopwell:

> Q. Would you describe the lighting in front of the bank on the night that you arrived to make the deposit on February 15, 1967? A. Well, there are lights in front of the bank. They have lights, you know, right on the bank there. (Tr. 10)

Q. So on the night in question, sir, just where did you stop your car in front of the bank? A. I pulled up in front of the front door of the bank.

Q. Was it well illuminated in that general area. A. Yes. (Tr. 11)

Q. Now Mr. Wakula, directing your attention specifically to the night in question of February 15, 1967, would you describe what lighting, if any, there was in front of the bank? A. Well, in front of the bank there were lights on the bank.

Q. Spotlights? A. I don't remember exactly what kind of lights. (Tr. 14)

Q. Did you indicate that there were lights on the front of the bank? A. There are lights in front of the bank, yes.

Q. What was the lighting in the driveway in front of the bank? How would you describe that? A. Good. You know, you could see.

Q. Is this a general business area where this bank is? A. Yes.

Q. How would you describe the general illumination in the area of this bank on Route 7? A. It is well lit, pretty well lit. (Tr. 14)

Q. Was the individual wearing any kind of a mask at the time? A. No. (Tr. 16)

Q. Now, would you describe on the night in question general lighting in back of this gas station where you were let out? A. Well, you get lights from the gas station and there are lights just before you get to the driveway here, maybe over here. (Tr. 21)

Q. Now, in point of time, sir, approximately how long was it from the time this individual first approached you at the bank, got into your car, until he left your sight and presence in back of the station? A. Three minutes.

Q. About three minutes? A. Three minutes.

Q. During that time, sir, did you have an opportunity to look at him. A. Yes, I did. (Tr. 22)

Q. Is there an overhead light in your car? A. Yes.

Q. Was it in operation or working on the night of February 15th of 1967? A. Yes, it was.

Q. Did that light go on when this individual got into your car and when he got out of your car? A. Yes. The lights are positioned toward the rear of the car.

Q. Overhead dome light? A. Two lights above the two back vent windows.

Q. In the approximate center or to the rear of the vehicle? A. Towards the rear of the car and there is a light underneath the dash.

Q. Did all of these lights go on this night? A. They all worked at that time, yes. (Tr. 28-29).

Based on his ability to observe, the victim picked out the petitioner's photograph from a series of nine (9) pictures. These pictures were shown to Wakula just three days after the crime under non-suggestive conditions:

Q. Can you describe in physical detail the appearance of the individual who got into your car as far as his height, weight, features, hair, coloring or any other distinguishing features that you can remember? A. Approximately six foot tall, about 180 pounds reddish hair, he had a goatee, Van Dyke style to about here, light complexion, prominent nose.

Q. Prominent nose. Did you describe this individual to the police? A. Yes, I did (Tr. 30).

Q. Was there any suggestion by Trooper Draper as to which picture you should pick out? A. No.

Q. Any suggestion by him in any way? A. No.

Q. Just what did he say to you? A. I don't recall the exact words. He just gave me the pictures and wanted to know if I recognized anyone in the picture.

Q. Were they all pictures of Caucasians? A. Yes.

Q. Some with beards and some without? A. Yes.

Q. Did you pick a photograph out? A. Yes, I did.

Q. You now know the name of the person in the picture? A. Yes.

Q. Who was it? A. Steven Duffen.

Q. In that picture was he with or without the goatee he had on February 15th? A. Without.

Q. But you were still able to identify the photo? A. Yes (Tr. 44-45).

And Trooper Draper testified as follows on the issue of identification:

> Q. What were his exact words in designating this picture of Mr. Duffen? A. He told me this is a photographic likeness of the person who held him up, although, on here he does not have a beard, or a goatee rather (Tr. 54).

In regard to the chance meeting at the State Police barracks Officer Quaintance testified as to the reason it occurred and the conversation he had with the victim:

> Q. There was no point when you told Mr. Wakula that I am to bring Mr. Duffen in and you are to identify him or words to that effect? A. No, I never did.
>
> Q. Was there any discussion by you to him that Mr. Duffen was the one who committed this crime? A. No.
>
> Q. As far as you know, Detective, there was no conversation at this table at all concerning this crime? A. Not at the table, no.
>
> Q. Thereafter at some point, Detective, did Mr. Wakula indicate anything concerning this accused? A. Yes, he did.
>
> Q. When was that? A. That was in the hall in the Circuit Court at Norwalk.

Q. What, if anything, did he say? A. He stated to me that that was the man that held him up.

Q. Before that you had no conversation with him concerning any identification? A. No (Tr. 63-64).

The in-court identification related back to the crime and was not affected or tainted by the chance meeting at the State Police barracks. This was related to the jury by Wakula during the course of his testimony:

Q. Now, the identification you have made here this morning of this accused in this session we are now having, what is that identification based on? A. Based on what I remember from the holdup.

Q. It is fair to say that is based on what you observed of his personal characteristics and facial traits as of the date of the holdup? A. Yes.

Q. Are you positive of your identification? A. Yes (Tr. 46-47).

Q. Mr. Wakula, on what basis do you make this identification? A. I base it on what I recollect of the person's characteristics of the night I was held up.

Q. Are you positive of this identification? A. Yes, I am (Tr. 89).

In addition the petitioner also admitted on several occasions his participation in the crime. These admissons of guilt were made to Officer Quaintance who testified as follows:

Q. Now, after this particular date that you mentioned, did you have any further conversations with this accused or did he at any time volunteer any further statements of information to you concerning this matter? A. Yes, he did.

Q. When was the next time you remember another conversation? A. I don't know the exact date, but it was on a continuance date approximately two weeks

later that Mr. Duffen again volunteered the information without questioning that he held up the victim.

Q. Did this happen any other times other than the three times that you have mentioned in this conversation, if you remember? A. This particular statement that he had held up the manager had been repeated to me I would say definitely at least five different times, sir, in the times that I have taken the accused to Court.

Mr. Gormley: I have no other questions, your Honor.

Cross-examination by Mr. Bundock:

Q. Well, Officer Quaintance, you say at least five times he made these admissions to you? A. Yes, sir.

Q. Was there any other officer present at this time? A. Always another officer. We always transported him with another officer.

Q. Now, you said that he made an admission to you while leaving the side door of the barracks on his way to the Circuit Court, is that correct? A. That is correct.

Q. That is the first time? A. That is the first time.

Q. That is on April 26th? A. 26th. (Tr. 158-159)

And again the petitioner told the officer of his responsibility for the crime:

Q. Did Duffen make any reference to Mr. Wakula in your presence? A. Yes, he did.

Q. What did he say? A. When we got outside of the barracks enroute to the Court, Mr. Duffen stated to me that he did not think that Mr. Wakula was as large as he was when he held him up. (Tr. 63-64)

The claims of the petitioner are devoid of substantive merit. The showing of photographs to the victim of the robbery by an Officer of the State Police was without suggestion or any other impermissible act. As this Court has

stated, each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmonds* v. *United States,* 390 U.S. 377, 384. The photographs resembled the description of the perpetrator as described by the victim shortly after the crime. The Police Officer who displayed these photographs to the victim did so without comment. The procedure followed in the instant case was clearly without prejudice to the petitioner.

The chance meeting at the State Police office in Westport, Connecticut on the day of the hearing in probable cause did not affect the in-court identification. The Courtroom testimony of the victim was independent of and based on the activities on the night of the crime and the viewing of photographs. It stood alone and was independent of the chance meeting. See *Gilbert* v. *California,* 388 U.S. 263, 272. It did not fall within the purview of the constitutional test as enunciated by this Court. *United States* v. *Wade,* 388 U.S. 218, 241 and *Wong Sun* v. *United States,* 371 U.S. 471, 488. Indeed this meeting played no part in the ability of the victim to make the positive identification at trial. The "totality of the circumstances" of this case did not contain an identification procedure which was unnecessarily suggestive or conducive to irreparable mistaken identification as to be a denial of due process of law. *Foster* v. *California,* 394 U.S. 440, 442 and *Stovall* v. *Denno,* 388 U.S. 293.

As to the claim that the trial Court judge did not rule on the admissibility of the in-court identification the transcript contains what was a hearing on a motion to suppress

the identification (Tr. 30 et seq.). After this hearing the trial Court ruled and overruled the objection (Tr. 88). Only then was the jury brought back and the trial continued. During the course of that hearing there was a full discussion by the Court and counsel concerning the constitutional issues.

The chance meeting of the victim and the petitioner at the State Police barracks on April 26, 1968 was not for identification purposes and was not a part of the criminal proceedings. Since this was not a "critical stage" of the proceedings there was no violation of the right to counsel. *Coleman* v. *Alabama,* —— U.S. ——.

Conclusion

The in-court identification by the victim was clearly based on his ability to recognize the petitioner from his memory of the night of the crime. This is fortified by a review of the testimony concerning all those factors which in their totality comprise the ability of one individual to identify another individual. Based on the testimony the chance meeting was not a factor in the identification process and any error resulting therefrom was harmless.

The respondent submits that no constitutional issue is raised by this case and respectfully urges this Court to deny the Petition for Certiorari.

Respectfully submitted,

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